United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1285

7cc

B

PAS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

VS.

SAMUEL F. MEYER, A/K/A
WILLIAM BARTLETT, A/K/A
Jack Forrest,
Appellant

APPELLANT'S BRIEF AND APPENDIX

Frank Metro, Esquire
976 Broad Street, Second Floor
Newark, New Jersey 07102

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES (CONTINUED)

STATUTES CITED

Page

AUTHORITIES CITED

QUESTIONS PRESENTED

1. Whether the imposition of consecutive sentences was manifestly excessive, unusually harsh, and represented an abuse of discretion since the alleged criminal use of the mails (as set forth in each of the counts of the indictment) were really part of the same transaction or scheme and since the crime involved, together with appellant's past record, were totally void of any criminal violence.

2. Whether appellant may be legally sentenced on six counts of an indictment charging essentially various aspects of the same offense (mail fraud) allegedly committed in furtherance of the same scheme or transaction.

STATEMENT OF FACTS

Appellant, Samuel Meyer, entered a guilty plea on six of nine counts of a criminal indictment, charging him with mail fraud (18USCA1341). Sentence was imposed on April 8, 1975, by the Honorable Kevin Thomas Duffy, District Court.

He was sentenced to five years each on the first and second counts. The sentence on the second count was to run consecutive to the first. A five-year sentence on the third count was to run concurrent with the first two. Five years probation was imposed with respect to counts 6, 7, and 8, said probation to commence on the expiration of the aforementioned sentences. Each of these sentences was to run consecutive to the present sentence appellant is now serving at the New Jersey State Correctional Facility, Trenton State Prison (he has been serving a three-to-five year aggregate sentence there since August 14, 1974). The aforementioned cumulative sentencing totals some thirteen to fifteen years.

The facts surrounding the indictment may be summarized as follows. According to U.S. Postal Service reports, the Union Mart Corp. was set up by appellant in 1972. It was to function as a new national credit card concern. The reports and the indictment allege that the corporation was set up solely to fraudulently obtain money, goods, and services through false

representations advanced to obtain credit. False credit information allegedly was presented by the corporation and a second dummy corporation to various lending institutions and commercial concerns. The transmission of this information was sometimes accomplished by use of the mails. Each of the nine counts of the indictment pertain to a specific date upon which the mails were used to allegedly perpetrate the fraud.

Despite the singleness of purpose of the scheme and the fact that each act alleged was part of the same continuing offense, the U.S. Attorney chose to treat each use of the mails as a separate indictable offense. In turn, the U.S. District Court, in imposing sentence, also failed to take cognizance of the continuing unity of the offense.

Although appellant has a criminal record showing approximately seven convictions over the last 15 years, a review of those charges indicates that they were all of a non-violent nature. They include insufficient funds, obtaining money by false pretenses, larceny by trick, false statements given to secure a passport and fraud by wire. Appellant acknowledges the justification for sentencing with respect to those offenses and present charges. However, he maintains that the non-violent nature of the offenses and the fact that he offers no physical

danger to the public should be factors to be weighed by the court in imposing sentence. Further, the sentence imposed upon him should bear some rationale relationship to that imposed upon defendants for violent crimes.

Appellant urges that the facts set forth herein demonstrate the unreasonableness and arbitrariness of the consecutive sentences imposed.

LEGAL ARGUMENT

POINT I

THE CONSECUTIVE SENTENCES IMPOSED WERE MANIFESTLY EXCESSIVE.

The U.S. Court of Appeals, in various jurisdictions, have recognized that they do possess the power to review an exercise of sentencing discretion by the trial court. Accordingly, in U.S. Vs. Wiley 278 F.2d 500 (7th cir. 1960), U.S. Vs. Loduga 274 F.2d 57 (6th Cir. in 1959) U.S. Vs. Wilson 450 F.2d 495 (4th Cir. 1971) and Marano Vs. U.S. 374 F.2d 583 (1st Cir. 1967), sentences imposed by the District Court have been modified or remanded for reconsideration for a variety of reasons. Courts of Appeals in increasing numbers, have begun to carve exceptions to the rules forbidding appellate review of sentences as expressed in Gore Vs. U.S. 357US386 (1958). Reliance in many cases has been based on 28USCA2106 which declares that appellate courts may modify, vacate, or reverse any judgment decree or order lawfully brought before it and may remand the case for the entering of an appropriate order or for a reconsideration of specific issues.

The reasons advanced by these Courts of Appeal for ordering a reconsideration of sentence vary with the factual equities of each particular case. In Smith Vs. U.S. 273 F.2d 462 (10th Cir. 1960), it was held that sentences found to be cruel and

unusual should be reconsidered. The Fourth Circuit in U.S. Vs. Pruitt 341 F.2d 700 (1965) concluded that the Appellate Courts should review any sentence where exceptional circumstances are found to exist. The Sixth Circuit, in U.S. Vs. Loduga, supra, modified the District Court sentences after concluding that the facts demonstrated a manifest abuse of discretion by the trial court.

The factors peculiar to each case, the defendant's background, the nature of the crime, the prospect of rehabilitation, and the relative dangers to the public or absence thereof have all been utilized by the Appellate Courts as an equitable basis for ordering a reconsideration of sentence. Thus, it was said in U.S. Vs. Wiley, supra, that "Where the facts point convincingly to the conclusion that the District Court has, without justification, arbitrarily singled out a particular defendant for a more severe sentence (than the co-defendant's), the court won't hesitate to correct the disparity." Likewise in Marano Vs. U.S., supra, sentence reconsideration was ordered where the trial court gave substantial consideration to legally inpermissible factors.

Of significant relevance to the case sub judice are those cases where consecutive sentences on different counts of an indictment were reconsidered based on the Appellate Court's conclusion that the various offenses really stemmed from the

same scheme. U.S. Vs. West Coast News Co. 359 F.2d 855 (6th Cir. 1966) is a case in point. There, defendants were given consecutive sentences on each count of the indictment, charging the interstate transmission of obscene materials by the mails and common carrier. Each separate date of transmission was the basis for a count, although all activities of the defendant were part of the same scheme. Although the Sixth Circuit acknowledged that, legally, such use of the counts and separate sentencing thereon was permissible, it concluded that the interrelationships between the events was such that the better practice would be not to impose consecutive sentences. Reliance for this holding was based on Beckett Vs. U.S. 84 F.2d 735 (6th Cir. 1936) where that court concluded that caution and moderation should be exercised in imposing consecutive sentences for offenses which might more realistically be viewed as components of one course of conduct.

This same conclusion was reached more recently in U.S. Vs. Mackay 491 F.2d 616 (10th Cir. 1974), a case which, like the matter sub judice, involves a violation of Title 18 of the U.S. Code. There, a defendant was convicted of mail fraud and securities fraud and given a one-year consecutive sentence on each of 15 counts of the indictment. The defendant argued that the sentence was excessive since the violations on the various

dates were all part of a single common scheme. The Tenth Circuit agreed, modifying and remanding the matter for sentence reconsideration. The keynote of this decision, as well as that in the aforementioned obscenity case, is clear. Although legally various criminal activities in furtherance of a common scheme may be the basis for separate counts of an indictment and separate sentencing, the better practice, given the single scheme involved, is not to impose consecutive sentences. Appellate Courts will review such excessive sentencing carefully in order to determine if trial court discretion may have been abused.

The facts surrounding the sentencing of defendant, Samuel Meyer, reflect excessiveness, abuse of discretion, and cruel and unusual punishment. The government chose to include a separate count in the indictment for each use of the mails by defendant. Yet it is clear that each such mailing was all part of the same scheme. The basic criminal offense charged is the use of the mails to fraudulently obtain credit. To impose a sentence for each date defendant acted in furtherance of the same alleged plan is tantamount to separately sentencing one who unlawfully consumes alcohol for each drop he drinks. The courts in Mackay and West Coast News Co. have concluded that such sentencing in this type of case is unreasonable, excessive, and represents an abuse of discretion. Defendant herein asserts that the court should follow the precedent of those cases and modify the District Court sentence

imposed. As was said by the Appellate Division of the N.J. Superior Court in a similar case (State Vs. Johnson 67 N.J. Super 414 (App. Div. 1961):

> "When more than one statute is violated, courts should consider the social norms intended to be vindicated by the several statuatory provisions and when all of the facts that constitute all of the crimes charged in reality constitute only a single episode and violate only a single one of those norms, consecutive sentences should not ordinarily be imposed."

Aside from the improper weight given by the court to the separate activities of the same alleged scheme for purpose of sentencing, there exists other basis for finding the sentences imposed excessive. The crime involved a non-violent one. The Advisory Council of Judges (National Council on Crime and Delinquency) in preparing their Model Sentencing Act declared that it is the violent criminal (as opposed to the one who practices fraud and deceit) who most incurs the wrath of the public. In determining the degree of sentence, the need for the protection of the public against physical violence is the

primary concern. Defendant, Meyer, both with respect to the present offense and his prior record, has never engaged in a course of violent conduct.

To be sure, the record contains instances of surreptitious larceny and fraud. However, there is nothing in the record which should place him in the category of the violent criminal or murderer. To impose consecutive sentences upon him which would run consecutive to any sentences he is presently serving would imprison him for a period of time equal to that of the violent criminal, for whom the most severe sentences are meted out. Clearly, sentencing for fraud must bear some proportionate relationship to sentencing for homicide, armed robbery, etc. Since these crimes are distinguishable, the sentences imposed with respect to each should be distinguishable.

As was stated in the Introduction to the "Standards Relating to Sentencing Alternatives and Procedures" of the American Bar Association (Approved Draft 1968):

> "A sentence which is not in some fashion limited in accordance with the particular offense can lead to a system of incomparable brutality."

Thus, the particular offense involved here, even when viewed in conjunction with a long prior history of fraudulent conduct, should not result in the imposition of a lengthy sentence comparable to the violent criminal. Indeed, in U.S. Vs. West Coast

News Co., supra, the court ordered a reconsideration of the consecutive sentences despite the fact that the defendants there had a long history of non-violent criminal behavior.

In view of the above then, it is clear that the favorable manner in which the Appellate Courts view the single transaction or scheme concept for purposes of sentencing, the non-violent nature of the crime charged and the lack of any relationship between the sentence imposed and that reserved for violent offenders all demonstrate the unfairness, excessiveness, arbitrariness, and unusualness of the sentences meted out. Accordingly, defendant Meyers requests that the 2nd Circuit Court of Appeals either modify the sentences or, in the alternative, remand the matter for sentence reconsideration.

POINT II

THE SENTENCES IMPOSED WERE IMPROPER SINCE THE CONVICTIONS ON SIX OF THE COUNTS OF THE INDICTMENT ALL AROSE OUT OF THE SAME TRANSACTION OR SCHEME.

It is well settled that criminal activities which are the subject of separate counts in an indictment merge and are considered as one if they arise out of the same transaction or scheme. Sullivan Vs. U.S. 485 F.2d 1352 (5th Cir. 1973). Thus,

where a defendant was convicted on three separate counts of an indictment charging robbery, larceny and assault, all in connection with one specific bank robbery episode, consecutive sentences, by the trial court, were vacated since they were all considered part of the same offense. U.S. Vs. Mackay 474 F.2d 55 (Md. 1973).

This treatment of a variety of criminal activities in connection with one episode as one offense applies to a variety of crimes other than robbery. Furthermore, it is not critical to the merger that the proofs not vary as to each activity. In U.S. Vs. Clements 471 F.2d 1297 (9th Cir. 1972), the defendant, by possessing a certain gun, violated three separate sections of the Firearms Act. The three counts of the indictment represented the violation of each such section. However, despite the differences of proof on each count, the Ninth Circuit set aside sentences of three consecutive ten-year terms holding that the three violations were all part of the same transaction and should be treated as one offense.

The facts in the case sub judice adequately demonstrate that the substance of each count of defendant's indictment also represents but one transaction or scheme. Although it is alleged that defendant utilized the mails nine times in furtherance

of his scheme, the essential crime remains the same: utilizing the mails to help perpetuate a fraud. Accordingly, defendant should have been sentenced on the basis of one offense and not six separate ones.

Defendant Meyers is aware of the holdings in Mitchell Vs. U.S. 142 F.2d480 (10th Cir. 1944) and U.S. Vs. Diogardi) 492 F.2d 70 (2nd Cir. 1970) which declare that mail fraud and securities fraud should be treated as distinct categories for which separate violation may be the subject of separate counts in an indictment dispite their common scheme. However, defendant asserts that such cases should be overruled as no valid reasons exist for creating such arbitrary distinctions. Any comparison of these cases to the ones discussed above reveals that factually they are strikingly similar and present no logical basis for differentiation. Indeed, it would seem inexplicable that robbery and the kidnapping of a hostage, two very serious offenses, should be treated as one for purposes of sentencing when two instances of mail fraud, committed in close proximity, in furtherance of the same scheme are treated separately.

In comparing one crime to another, various similarities can always be found to exist. They may involve a common victim, be committed on the same date, involve the same criminal instrumentality, have the same objective, etc. What makes one type of similarity a proper candidate for merger while another

is not? Is it proper to single out mail fraud for differentiation when it is not a violent crime and more properly constitutes a single scheme or transaction then the act of robbery followed by a kidnapping?

Defendant asserts that the reasons for the differentiation are arbitrary and unreasonable and argues that the criminal activities for which he is charged should be treated as one scheme or transaction. Accordingly, the consecutive sentences imposed should be modified.

CONCLUSION

For the above reasons, appellant, Samuel Meyer, respectfully requests this court to remand his case for re-sentencing.

Respectfully submitted,

Frank Metro

Frank Metro, Esquire
976 Broad Street, Second Floor
Newark, New Jersey

Attorney for Appellant

July 18, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA - v - SAMUEL F. MEYER, a/k/a "William Bartlett," a/k/a "Jack Forrest," Defendant.	INDICTMENT S 74 Cr. (K.T.D.)

The Grand Jury charges:

From on or about the 1st day of August, 1972, up to and including the 3rd day of August, 1973, in the Southern District of New York and elsewhere, SAMUEL F. MEYER, a/k/a "William Bartlett," a/k/a "Jack Forrest," the defendant, unlawfully, wilfully and knowingly, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from the First National City Bank, 55 Wall Street, New York, New York; Bonwit Teller, 721 Fifth Avenue, New York, New York; Carey Cadillac Renting Company, Inc., 41 East 42nd Street, New York, New York; Briggs Leasing Corp., 777 Northern Boulevard, Great Neck, New York; Lawrence Paul Agency, 3805 Kennedy Boulevard, Jersey City, New Jersey; IBMCorporation, 2 Penn Plaza, New York, New York; U-Auto-Lease, Inc., 3741 West Chester Pike, Newton

Square, Pennsylvania; Willoughby-Peerless, 114 West 32nd Street, New York, New York, and diverse other persons and corporations whose names are to the grand jury known and unknown (hereinafter referred to as "persons to be defrauded") in the manner and by the means hereinafter set forth.

2. It was a part of said scheme and artifice that the defendant would organize and cause to be organized the Union Mart Corporation and would open an office for said corporation at 80 Wall Street, New York, New York, knowing full well and intending at that time that said Union Mart Corporation would have no legitimate business interest or purpose and would be without assets of any kind.

3. It was further a part of said scheme and artifice that the defendant would cause to be given and would himself give false and inaccurate credit information concerning the Union Mart Corporation to the persons to be defrauded.

4. It was further a part of said scheme and artifice that the defendant would and did purchase goods and receive services from the persons to be defrauded on behalf of the Union Mart Corporation knowing full well at that time that he and his corporation had no intention of paying for such goods and services.

5. On or about the dates hereinafter set forth, in the Southern District of New York, SAMUEL MEYER, a/k/a "William Bartlett," a/k/a "Jack Forrest," the defendant, unlawfully, wilfully and knowingly and for the purpose of executing the scheme and artifice set forth in paragraphs 1, 2, 3, and 4 in this indictment and attempting to do so, did place and cause to be placed in post offices and authorized depositories for mail matter, certain matter and things to be sent and delivered by the Postal Service and did knowingly cause such matter and things to be delivered by mail according to the direction thereon, as set forth in Counts 1 through 9 listed below:

COUNT	ADDRESSEE	SENDER	APPROXIMATE DATE
1	Mr. William Bartlett Union Mart Corp. 80 Wall Street New York, New York	First National City Bank 55 Wall Street New York, New York	Mid-September, 1972
2	Mr. Michael A. Russo Assistant Manager C/O First National City Bank 55 Wall Street New York, New York	William Bartlett Union Mart Corp. 80 Wall Street New York, New York	9/19/72
3	Mr. William Bartlett Union Mart Corp. 80 Wall Street New York, New York	First National City Bank 55 Wall Street New York, N.Y.	9/22/72
4	Mr. Henry J. Eichfeld, Jr. IBM - Data Processing Division 2 Penn Plaza New York, New York	William Bartlett Secretary Union Mart Corp. 80 Wall Street New York, N.Y.	9/26/72